IN THE HIGH COURT OF JUDICATURE AT BOMBAY

Appellate Side

Civil Revision Application No.8l of 2005

Hindustan Petroleum Corpn Ltd.. Applicant
vs
Gulabdas Harjivandas Broker & anr-Respondents

Mr N V Walawalkar with Minoo Sindia i/b Rustomji and Ginwala Advocates for applicants
Ms Ranjana Parikh for respondent no.l

CORAM: A.M KHANWILKAR J.

Dated l6.l.2006

P.C:

l. Heard the learned counsel for the parties. Perused the relevant record. I find no infirmity in the conclusion reached by the court below in decreeing the suit in favour of the plaintiff,which view is founded on tangible reasons recorded in the impugned judgment. No case is made out for exercise of revisional jurisdiction.

2. Mr Walawalkar, however, argued three points to persuade me to hold that the matter requires consideration. The first contention raised across the bar is that, the affidavit in lieu of examination in chief filed by the plaintiff's witness did not contain verification clause for which reason the said affidavit was inadmissible in

evidence. Reliance is placed on the decision of the Apex Court in support of the said contention in the case of A.K.K.Nambiar vs Union of India, AIR l970 SC 652. I find no substance in this submission. In the first place, no such objection was taken before the trial court or appeal court. Nor has been specifically raised in the memo of resivion application, but raised across the bar.In any case the plaintiff’s witness who had filed the affidavit in lieu of examination in chief was made available for cross examination and subjected himself to cross examination. Reliance placed on the decision by the learned counsel relates to the affidavit filed in the proceedings (referrable to Order l9 C.P.C.) where the affiant is not subjected to cross examination, which is not so in the present case. For, the subject affidavit is filed in terms of provisions of Order l8 C P C in lieu of examination in chief.

3. The second contention raised before me is that, the entire evidence of P.W.l who was Power of Attorney holder of the plaintiff, is required to be discarded in view of the decision in Janki Vashdeo Bhojwani and anr vs Indusind Bank Ltd and ors,(2005) 2 SCC 2l7. It is submitted that since

the plaintiff himself had not entered the witness box to depose the facts, his Power of Attorney holder cannot be permitted to prosecute the suit on behalf of the plaintiff. Once again this submission is raised for the first time across the bar. No such contention was raised either before the trial court or the appeal court. Besides, no such specific ground is taken in the memo of revision application in this behalf. The applicant cannot be allowed to take the other side by surprise. In any case, there is no substance even in this submission.

4. For,I find force in the argument of the learned counsel for the respondent that the observation made in Janki Vashdeo Bhojwani's case (supra) by the Apex Court were in the fact situation of that case. In that case, inspite of the remand order passed by the Apex Court with specific direction, the appellants did not enter the witness box to lead evidence, as was required in terms of the remand order. The learned counsel for the respondent has rightly placed reliance on the decision reported in 2005(4) Bom C.R.554 in the case of Mangesh Govind Patane vs Nagesh Vasant Kadam and ors wherein the decision in Janki Vashdeo

Bhojwani (supra) has been considered. Be that as it may, I find substance in the argument of the respondent that the plaintiff's witness who deposed on behalf of the plaintiff had complete authority to do so. Besides, he had personal knowledge about the events. He was competent to depose to the extentof events within his personal knowledge. Viewed in this perspective, his evidence cannot be discarded. Indisputably, power of attorney has been admitted in evidence which authorises the witness to file and prosecute the plaint on behalf of the plaintiff. The plaintiff is an old man of 94 years. Viewed in this perspective the evidence of the power of attorney holder of the plaintiff as recorded cannot be said to be inadmissible or incompetent in the fact situation of the present case.

5. The third contention raised before me is that the suit notice issued on 30.l0.2000 was invalid. Indeed, ground is taken in the written statement that the suit notice is invalid. However, no specific case as been set out as to on what ground the suit notice was challenged and how the suit notice is invalid, as is the requirement under Order 8 Rule 2 of C.P.C. In the evidence also no

question is put to the witness so as to spell out the ground which is now pressed into service to contend that the suit notice is invalid. It is argued across the bar, for the first time, on behalf of the applicant that, on the date when the suit notice was issued on 30.l0.2000, the son of the plaintiff who incidentally is his power of attorney had no authority to terminate the tenancy of the applicant. Reliance is placed on the evidence of P.W.l's examination in para l3 wherein he has mentioned that he had approached the advocate for the plaintiff Mr. M.A.Chandan who sent the notice to terminate the monthly tenancy of the defendant no.l, the date on which the notice was issued. It was contended that there was no power of attorney existing in favour of the son of the plaintiff to terminate the tenancy of the applicant. On this basis it is contended that the suit notice was invalid and that it was no notice within the meaning of section l06 of the Transfer of Properties Act. The argument seems to be attractive, but there is no substance in this submission. In the first place, as mentioned earlier, in the written statement, no specific reason has been mentioned as to on what ground the suit notice was invalid. The plaintiff's witness

has not been cross examined, nor the defendant's witness has deposed specifically about the grounds on which the suit notice was invalid.No such contention was raised before the trial court or appeal court nor it has been specifically articulated in the memo of revision application. In such a case, applicant cannot be permitted to urge the ground for the first time that too across the bar in the revision application, which would result in causing prejudice to the plaintiff, taking the plaintiff by surprise. On the other hand, I find substance in the submission of the learned counsel for the plaintiff that the suit notice clearly refers to the fact that the same was issued by the advocate on instructions of the plaintiff himself. There is nothing in the evidence to doubt the correctness of this position. Indeed, the plaintiff's witness has in para l3 of his examination in chief has mentioned that he instructed the advocate to terminate the tenancy but that fact is not incorporated in the suit notice. As mentioned earlier the suit notice was issued by the advocate on the instructions of the plaintiff himself as noted therein. The notice is proved in evidence. There is no cross examination nor any evidence adduced by the defendant to

counter that position. In these circumstances the ground raised before this court for the first time, to my mind, is nothing but an argument of desperation.

6. Hence, this revision should fail and the same is dismissed.

7. At this stage Mr. Walawalkar prays that the applicant be protected for sometime to enable it to take up the matter in appeal. In the interest of justice, it is ordered that the parties to maintain status quo as of today with regard to the suit property for a period of 8 weeks from today.